Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

JEFFREY R. GOLIN AND ELSIE Y. GOLIN
ON BEHALF OF THEMSELVES
AND AS NEXT FRIENDS FOR DAUGHTER
NANCY K. GOLIN,

Petitioners

v.

CLIFFORD B. ALLENBY, DIRECTOR
DEPARTMENT OF DEVELOPMENTAL SERVICES,
STATE OF CALIFORNIA

Respondent

On Petition for a Writ of Certiorari
To The United States Circuit Court of Appeals for the
Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

FROM A DENIAL OF A CERTIFICATE OF APPEALABILITY FOR AN APPEAL FOR A PETITION FOR A WRIT OF HABEAS CORPUS
IN RE NANCY GOLIN

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QUESTIONS PRESENTED

1. Whether *Gault*[1]-*Winship*[2] Sixth Amendment criminal due process guarantees in nominally civil commitment proceedings extend revitalized confrontation clause rules to civil commitment matters following *Crawford*[3].
2. Whether the holdings of *Ankenbrandt*[4] limiting domestic relations abstention promulgate an exception to traditional *Lehman*[5] federal Habeas subject matter jurisdiction preclusion, where caring parents seek release on behalf of their incompetent adult child from wrongful state custody and control resulting from *probate* conservatorship proceedings.
3. Whether a "*jurist of reason could find it debatable*" that the very state court findings challenged as erroneous by a petition for Habeas Corpus may be presumed reliable by a reviewing court for the purposes of denying caring parents next friend standing under the second *Whitmore*[6] test.
4. Whether a court may find that the only party with standing to petition for habeas corpus on behalf of an incompetent person is a state appointed conservator, where the person is being wrongly deprived of her liberty in state custody and control.

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[1] *In re Gault* 387 U.S. 1 (1967)
[2] *In re Winship*, 397 U.S. 358 (1970)
[3] *Crawford v. Washington, 541 U.S. 36 (2004)*
[4] *Ankenbrandt v. Richards*, 504 U.S. 689 (1992)
[5] *Lehman v. Lycoming County Children's Services*, 458 U.S. 502 (1982)
[6] *Whitmore v. Arkansas*, 495 U.S. 149 (1990)

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PETITION FOR A WRIT OF CERTIORARI

Jeffrey R. Golin and Elsie Y. Golin, parents, next friends and lifelong caregivers of Nancy K. Golin, respectfully petition this Court on behalf of themselves and on her behalf for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit, denying the petitioners' application for a Certificate of Appealability, for an appeal from a denial by the United States District Court for the Northern District of California of a Petition for Habeas Corpus for the real party in interest, Nancy Golin

OPINIONS AND ORDERS BELOW

The following orders are included in the appendix.

September 14, 2004; Order of the 9th Circuit US Court of Appeals denying petitioners Motion for Reconsideration of a Request for Certificate of Appealability (04-15922).

July 16, 2004: Order of 9th Circuit US Circuit Court of Appeals granting Petitioners Motion for Reconsideration of a Request for Certificate of Appealability (04-15922).

June 25, 2004: Order of US Circuit Court of Appeals Denying Petition for Certificate of Appealability (04-15922)

May 12, 2004: Order Denying Certificate of Appealability by District Court (3-03-cv-05855).

April 4, 2004: Order Dismissing Petition for Writ of Habeas Corpus by District Court following exhaustion of state remedies (3-03-cv-05855).

December 23, 2003: Order of State Supreme Court denying review of a denial of a supplemental petition for writ of habeas corpus (S120778).

November 25, 2003: Order of State Supreme Court denying review of a denial of a petition for writ of habeas corpus (S120264).

November 24, 2003: Order of District Court Denying First Petition for Habeas Corpus (3-03-cv-02889).

May 15, 2003: Order of Santa Clara County Superior Court Denying Petition for Habeas Corpus. (Gallagher).

These decisions are all unreported.

JURISDICTION

The order of the US Court of Appeals for the Ninth Circuit

that is sought to be reviewed by this Court, denying petitioner's Motion for Reconsideration for a Certificate of Appealability, on appeal from the dismissal of the District Court of the Northern District of California, of their 28 U.S.C. §2254 Petition for Habeas Corpus, involving the unreasonable seizure and wrongful state custody and control of their adult retarded daughter Nancy Golin, was denied on September 14, 2004.

The United States Supreme Court has appellate jurisdiction in a writ of certiorari from the denial of the United States Circuit Court of Appeals for the Ninth Circuit, of a denial by a United States District Court of a Petition for a Writ of Habeas Corpus, by authority of 28 U.S.C. §1254(a). The United States Supreme Court may also has original jurisdiction by authority of 28 U.S.C. §2254(a) and, jurisdiction over petitions for habeas corpus by virtue of 28 U.S.C. §2251.

No rehearing has been sought or is available from this judgment except through this Court.

This petition is not sought under Rule 12.5, cross petition. Rule 11 does not apply here. The California State Supreme Court did not certify to the Attorney General that the Constitutionality of a State Statute was called into question.

STATEMENT OF THE CASE

A. *Characteristics of the Family*

Nancy Katherine Golin ("Nancy") is a 34-year-old autistic adult, severely retarded since birth. An only child, she has lived with and been competently raised and cared for at home since birth by dedicated parent-petitioners Jeffrey and Elsie Golin ("parents") essentially her entire life. They know their daughter well and care for her deeply. She had epilepsy since age 22 maintained by anti-seizure medications. She has a propensity to wander that the parents closely monitor. She is non-aggressive, has never been diagnosed with mental illness or had psychiatric medications prescribed for her, nor has ever committed or been charged with a crime. She is unable to read or write, and speaks only a few words, but understands and communicates very effectively with gestures, expressions and actions. She is alert, happy, charming, beautiful and gentle, optimistic and brave, patient and persistent, emotionally and

motivationally normal. She has a positive, sunny disposition, the pure innocent product of a lifetime of love and devotion. Her autism is atypical in that she is very sociable, relates well to people, and has no tics, self-injurious or ritualistic behaviors. She is ambulatory and able bodied, can toilet, dress and feed herself, and can tie her own shoelaces. She and her parents are profoundly attached to one another, and her parents remain with her constantly at all times. Her parents always put her needs before their own, priding themselves on having protected her from State institutionalization, integrated into normal community activities. The parents never saw it necessary to conserve her.

Mrs. Golin is a long time vocal critic of San Andreas Regional Center (SARC), the private non-profit corporation exclusively responsible for State programs for the retarded in Santa Clara, Santa Cruz, San Benito and Monterey Counties, for their negligence or indifference towards the "weakest among men", and the number of their clients they regularly kill through neglect. Mrs. Golin sought in vain for years during Nancy's formative years using every available means to obtain appropriate services such as speech therapy from local schools and SARC. She eventually gave up and obtained the best services she could find on her own in spite of State harassment. Together with her husband of 44 years, a professional engineer and post-graduate of MIT, they have spent a lifetime seeking the best available resources for their daughter's special needs. Their experience with State programs is they always did more harm than good. They failed Nancy's individual needs, caused her severe injuries[7], and exposed her to bad behaviors she mistakenly copied.

The parents are fit, active semi-retirees, owning operating a family neon lighting business they founded in 1990 to give them the time and flexibility to care for and provide activities for Nancy. Nancy loves to watch her father work, and the family goes on frequent outings and hikes together. Nancy is very

[7] Nancy's delayed epileptic condition likely resulted from a traumatic head injury she suffered in a poorly supervised SARC program at age 8. Her mother removed her. All her classmates there ended up being institutionalized at an early age, except Nancy.

presentable in public, and it is easy to tell what pleases her from her beautiful heartwarming smile. The parents take her with them everywhere they go and treat her like any normal person.

B. *Daughter Abducted by State from Her Family*

On the evening of November 14, 2001, Nancy wandered from her parents and got lost while they were moving their workshops to neighboring Palo Alto. The parents noticed her absence within five minutes and called the local police ("police") immediately for help searching the area all night. She could not be found. Next morning Nancy found her way own back, tired but delighted, well and unharmed, to her parents' intense joy and relief.

The police duped the unsuspecting parents, advising them they only intended to take Nancy to Stanford Hospital to make sure no one had harmed her while she was missing. Police took Nancy without warrant or notice saying the parents could meet them there. The parents cooperated without objection. Police delayed three hours, then took her to a locked psychiatric ward at nearby Stanford Hospital and obtained a TRO against her parents.

When they arrived at Stanford ER, the surprised parents were denied admission to see her or talk to doctors. Security guards told them Nancy had been placed on a psychiatric hold and turned them away on threat of arrest. The parents were justifiably terrified. Nancy had never been alone in a hospital without a parent there for history and informed consent, and had never been in a psychiatric ward. The staff let Nancy wander into rooms of dangerous inmates climbing into their beds seeking her usual maternal comfort, eating from their dishes[8].

Police created a cover story to psych ward doctors that Nancy was supposedly a homeless urchin, the victim of abuse and neglect by the parents, saying that she was "*found in a*

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[8] Stanford psych ward doctors warned APS that it was unsafe for Nancy with the men there, known to be dangerous, but APS officials ignored these warnings insisting that she remain there in harms way. When seen by her parents next Nancy displayed signs of molestation.

shed behind a pile of garbage" pretending at first she had had no doctors or medical records[9], and other falsifications. (See Statement of Case, State Petition).

Police misled Stanford psych ward doctors claiming Nancy's mother was overmedicating her on her Phenobarbital seizure medication. These levels are highly individual, as any qualified neurologist knows. In reality, there was no emergency. Nancy Golin was perfectly fine, happy and well cared for, *until* the police took her to the hospital! Nancy's blood levels were correct, had no seizures or adverse reactions on the day of admission and had not had any seizures for several months. She did not require any medical assistance whatsoever, and Stanford discharged her after two weeks for that reason.

On admission, accordingly, the clinical intake psych team led by Dr. Hayward slashed her anti-seizure medication to what they believed were "normal" levels throwing her into a week of protracted *grand mal* seizures due to undermedication. Neurology consult Dr. Schwartz was called in on 11/17/01. He remembered Nancy from a previous admission, and wrote on the 11/17/01 hospital record admitted into evidence, *"her level was good at time of admission"*, and by 11/23/01 Dr. Deisseroth approvingly noted her levels restored close to these same good admission levels (49.3). The seizures then abated. These were the original levels that her mother, under the supervision of her regular board certified neurologist Dr. Howard Belfer of San Mateo Hospital and *Stanford's own clinical neurologists themselves* had been administering.

Police applied at the hospital on intake for Nancy to be placed on a 72-hour hold, Cal. Welf. & I. §5150, for psychiatric evaluation alleging, "grave disability" as their reason to admit her. Then police applied for an extension to a 14-day hold Cal. Welf. & I. §5250 for intensive treatment alleging "grave disability", and a hearing was held without notifying the parents. Both laws are inapplicable to merely mentally retarded persons or persons who can live safely with family or friends by

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[9] The police detective that spread this cover story refused to confirm it under oath when confronted at trial.

State law[10]. Therefore, the application for the §5250 hold was judicially denied, November 26, 2001. The State lost all further legal authority for holding her. The TRO against her parents also expired. Nevertheless, when her parents went to pick her up, Nancy had been spirited away by state authorities, refusing to disclose to anyone where she was being held[11].

C. *Illegal Secret Detention; Malicious Prosecution*

When Nancy's psychiatric detention at Stanford Hospital was denied on grounds that she was merely retarded and not subject to involuntary commitment, state records clearly show that DDS and SARC and other state officials initiated a civil rights conspiracy[12] enlisting the District Attorney against Nancy's parents as a tactical means to continue to hold Nancy by fabricating a case for abuse and neglect against her parents, something they had in fact never done and never would do.

In fact, Nancy was illegally taken from Stanford Hospital by SARC workers and secreted at a SARC Residential Care Facility (RCF) known only to a few county workers. Her signature was forged by SARC workers to a SARC Individualized Placement Plan (IPP), legally requiring the informed consent and signature of a parent or legal conservator, to attempt to qualify it as a voluntary commitment. Nancy does not read, write or sign her name, nor does she have the capacity give such informed consent as SARC's capacity declaration states. APS clearly disclosed in their December 2001 records that they knew their actions were illegal saying if the parents discovered SARC's hideout they could do little legally to stop Nancy going with them, seeking to "avoid court if at all possible".

For all practical purposes, therefore, Nancy was kidnapped under the color of law by the state and held as a hostage. Once they had violated her, there was no going back. What followed was a complex coverup.

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[10] Cal. Welf. & I. §5008(h)(3), Cal. Welf. & I. §5250(d)(1). A mental health advocate warned police Nancy's detention was inappropriate.

[11] Even though released and her §5250 psychiatric hold denied, Stanford gave the RCF a discharge prescription for Trazidone, an antipsychotic, for her caregivers to dope her with as needed.

[12] The subject of the parents current 42 U.S.C §1983(5) suit *Golin et al v. Allenby et al* currently in the Ninth Circuit (04-15900)

The Palo Alto Daily News, contacted by the parents, printed several sympathetic stories in late November 2001, panicking the police. The paper was unable to find SARC's hideout. The police arrested them for unspecified Cal. PC §368(c) felony adult dependent abuse charges. The court set $100,000 bail, to keep the parents away from the press and almost preventing them from further legal opposition to Nancy's State custody. But the parents fortunately bailed out after one night in county jail and went back to fighting for their daughter's freedom.

After the parents' attorneys discredited the police version of events to the Santa Clara County DA's office and her doctor wrote the court a letter rebutting their supposed allegations, the DA knew or should have known there was no merit to these charges. Yet the DA continued to search for other grounds on which to prosecute them for 14 months. Extensive DA-subpoenaed records studied by the parents revealed ample proof of parental innocence and state conspiracy and abuse. DA ignored repeated requests of the parents' attorneys to specify grounds for the charges. This gave California Department of Developmental Services (DDS), nominated by SARC, time to pursue its conservatorship petition in Santa Clara County probate court before the DA dismissed charges.

Four months after police seized Nancy, March 2002, after APS was threatened with contempt, visits began one hour per week, oppressively supervised by APS, at an outside visitation center to strictly guard the location of her hiding place from friends and doctors. Nancy repeatedly begged her parents to take her home with them by trying to pull them out the door with her or selecting her father's car key out of his pocket and giving it to him, as she had always done to ask to be taken out.

D. *Secret State Conservatorship Petition*

SARC and DDS proceeded in secret in April 2002 to petition in probate to conserve Nancy and keep her in secret detention, seeking permission to put her into a State hospital, without giving the parents required notice of the proceedings against their daughter. DDS petitioned under Cal Hlth. & S. Code §416.5 applicable only to abandoned persons, seeking to avoid parental preferences. DDS and the Public Defender's Of-

fice (PDO) attorneys protested on record in four monthly probate hearings before probate judge Hon. Katherine Gallagher that it was impossible to notify the parents, knowingly misrepresenting, their "whereabouts were unknown," or that they had been "convicted of abusing Nancy" and were in prison, despite the weekly visits with Nancy and the attorney contacts.

E. ***Interim Conservatorship, Charges Dismissed***

In August 2002, Gallagher ordered SARC to notify the unsuspecting parents of the DDS conservatorship petition. They objected and filed their own competing petition. Hon. Gregory Ward finally heard this on October 15, 2002. The DA attended as a spectator. The Golins were unrepresented Ward let them speak articulately in great detail, repudiating APS's and SARC's allegations.

Ward appointed an independent conservator for the Golins until all charges were dropped. The parents were able to discover that Nancy had suffered serious injuries at the residential care facility including an unreported and untreated broken collarbone, dislocated shoulder, skull fracture, black eyes, psychotropic drugging and physical restraints. RCF records ironically showed she wandered unreported from them138 times in 12 months. She had been taken by her SARC caregivers to SARC-approved psychiatrist Dr. Hector Cerezo, misrepresenting her behaviors and history to get him to prescribe Risperdal, an even more potent and dangerous psychotropic medication to drug her "as needed" into a constant stupor. He did not warn low-skilled careworkers to monitor potentially lethal side effects she suffered: tremors, Parkinson's disorder, and tardive dyskinesia so they went unrecognized. Risperdal is FDA-listed for schizophrenia, not autism, strictly barred for epileptics. She had no neurologist for over a year because few neurologists take MediCal and SARC does not pay for anything themselves. In November 2002, the psychotropic drugs were discontinued at parental insistence and her symptoms markedly improved.

The false criminal charge against Mrs. Golin was **dismissed** on January 29, 2003 on a motion by the DA. The same charge against Mr. Golin was **dismissed** on August 4, 2003, after the supporting probable cause against *him* was amended to supposedly "allowing" Nancy to wander away *one* (1) time on

November 14, 2001. He was fully exonerated and his record expunged. The court ordered *these dismissed charges would have no effect upon the conservatorship proceedings.* Supervised visit requirements were dissolved; a favorable outcome.

F. *State Temporary Conservatorship Imposed*

The Golins expected their petition would be approved by probate and Nancy could return home. Yet in probate a few days later Hon. Thomas Edwards moved temporary conservatorship to the State pending a contested conservatorship trial between parents and DDS. Edwards appointed opposing attorney, Santa Clara County public defender Malorie Street ("Street") to represent Nancy. Street never conferred with the parents. From the start, she did damage control for the State by attacking the Golins. She appeared at opposing counsel table with State DDS attorney Dean Stiles and SARC attorney Nancy Johnson, filing joinder motions. Stiles-Johnson-Street had worked as a team on many such probate cases since 1995. By selecting a known adversarial attorney for Nancy, the court gave up all pretense of impartiality against Golins.

Street advocated for the State to conserve Nancy, not the parents or other petitioners. She blocked Nancy's right to a jury. She objected to Nancy being produced in court. She insisted that Nancy remain in the same RCF where she was drugged and injured. Street argued the State had to conserve Nancy to obtain her medical records; using this power, she shut down all discovery rights showing proof of State abuse on the excuse of Nancy's privacy. She argued for the State to conserve Nancy to put her back on Risperdal, asserting it benefited her. She got supervised visits reinstated by probate, orders restricting Nancy to Santa Clara County, that her parents could not take her to a doctor, blocking her right to sue the State for injuries. Edwards granted these non-noticed motions without showing cause or authority[13]. The hearing transcripts were severely altered helping the State cover up. Thus despite dismissal of charges the State took temporary conservatorship away maintaining custody of Nancy.

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[13] The parents' attempt in May 2003 to substitute an effective non-conflicted private attorney for Nancy was denied by Gallagher.

Two weeks after Nancy was temporarily conserved by DDS pending trial and Street's advocated illegal drugging on Zyprexa resumed, Nancy was rushed unconscious in serious condition to San Jose Medical Center, with uncontrolled seizures vomiting up blood and quarter inch chunks of her esophageal lining. This life threatening disorder proved to be related to the drugging in testimony[14]. Street's liability in advocating this as an excuse to give Nancy to the state thus posed great conflicts of interest with her presumed client. It caused severe permanent brain damage, the loss of her entire esophageal lining, a permanent precancerous condition, and huge esophageal ulcers. A San Jose reporter discovered a caregiver was ordered by SARC never to take Nancy to ER's when she had critical seizures, to prevent unwanted disclosures.[15]

G. *Conservatorship Trial: Parents v. State*

In October 2003, almost two years after Nancy was illegally seized from her family, while she remained in State custody and control with the parents unable to visit, a three-week court trial was held in Santa Clara County Superior Court, Hon. William Martin presiding. He was to decide if Nancy should be conserved and if so by whom, the parents or the State, (DDS, *not SARC*).

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[14] SARC concealed Nancy's hospitalization. SARC doctors lied about her condition; caregivers covered up to police. The parents could not visit her to comfort her at the hospital. Nancy could have died never seeing her parents again. Street covered up *real* state abuse for months saying the parents were alarmists or liars attacking their credibility. The parents moved on an exparte emergency motion. Gallagher gave the parents a week to prove Nancy was gravely ill, but denied a motion to compel discovery. SARC clamped a lid on their doctors. Street sought out and counseled obstruction to those served with subpoenas, alleging exclusive control of Nancy's records and concern over her client's privacy. Gallagher denied the exparte motion. In May, subpoenaed records surfaced confirming that Nancy *had* been given a life-threatening, pre-cancerous, nearly ruptured esophageal condition from Zyprexa lowering her seizure threshold. SARC ordered caregivers not to take Nancy to ER's when she had uncontrolled seizures, to prevent disclosures.

[15] Najeeb Hasan, "*Saving Nancy*", San Jose Metro News, April 28-May 4, 2004. Plaintiffs disagree with *some* of the disparaging factual content in this article, but in this regard it is accurate.

The trial was a fundamentally unfair proceeding. The parents lacked counsel and no longer had the several tens of thousands of dollars required to retain one in such cases after being forced to dissipate their retirement funds in two years of litigation. Mrs. Golin so objected to no avail, and with difficulty the parents represented themselves. Both parents were extremely knowledgeable on the available evidence and put on a remarkable case for non-lawyers.

The parents objected to Nancy being conserved arguing that it was unnecessary living in her own home with her parents but if she were conserved they should have first preference under Cal. Prob. Code §1812. The court quickly disposed one of the parents' friendly alternate candidates for conservator on suspicious procedural grounds, displaying intolerance to any petitioner other than the State. The other alternate folded under threat of attack by SARC.

Martin denied the parents' *in limine* challenge of SARC's standing; the petitioner was the State *DDS, not* SARC. SARC was represented by Johnson, a full partner in Berliner-Cohen ("BC"), a powerful personal injury and white-collar corporate criminal defense firm in San Jose. BC's prime motivation to protect their tortfeasing client SARC from injury claims and a feared liability lawsuit by becoming Nancy's conservator was suspect, skewing the risk of erroneous factfinding. Martin denied parents' challenge of attorney Street for conflicts of interest. Street again blocked the parents' motion for a jury trial for their daughter claiming she alone had standing to request this, and she did not request it. BC played lead attorney for the State orchestrating SARC's attack, tilting the playing field for conservatorship clearly favoring the State.

The parents won previously denied right to require Nancy's presence in court as required Cal. Prob. C. §1825, over the objections of the State, SARC and Ms. Street. When Nancy Golin was presented to court, on her 33rd birthday, she embarrassed the opposition by displaying obvious affection for her parents and they to her[16]. Martin reacted that there had never been

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[16] On succeeding days, Street kept Nancy out of the court as much as possible to avoid further embarrassment to the State's case, by having

(cont'd next page)

any question about the love and devotion that the parents had for their daughter. He instead posed, who would make the better conservator in Nancy's presumed best interests, the parents or the State.

Thirteen witnesses gave testimony for the parents. Only four witnesses appeared for the State, and in each case, their testimony broke down under cross-examination. The parents presented numerous medical experts and family friends who observed and admired the family for years. Mr. Golin unreservedly praised his wife's competence and devotion as a primary caregiver and loving mother, testifying from personal knowledge she had never neglected or abused Nancy, calling such charges ludicrous.

The medical experts called by the parents built up a compelling chain of evidence proving state abuse showing that because SARC pretended to new doctors there was no past medical history, they had subjected her to a life threatening injury and illness from drugging, and substandard care. This included failure to continue a necessary regimen of treatment of a past chronic hiatal hernia and esophageal condition that had been in remission. They showed a pattern of chronic orthopedic injury and abuse in state care, dental neglect, injury due to improper drugging, and caregiver indifference.

All evidence of abuse by SARC and Ms. Street was whitewashed by Martin. Critical witnesses were allowed to evade subpoenas when Martin prematurely rested the parents' case[17], imposed arbitrary time limits on key testimony, and kept out damning evidence against the State.

There is only enough space here to give one example of the most outrageous abuse of discretion committed by the Martin superior court. A companion petition for certiorari from the State Supreme Court contains more.

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her deprived of water many hours before court and given behavior modification to leave the courtroom quickly to get water.

[17] Street was seen in the hallway during breaks openly intimidating petitioner's witnesses, such as Drs. Morgan and Cerezo, after which Morgan tried to disparage the Golins but his statements broke down on cross examination. Martin refused to order this stopped and cites Morgan's disparaging remarks.

Martin concluded from written hospital records admitted under the then-permissible Cal. Evid. C. §1270 that unqualified psych ward doctors who had committed a serious medical error when Nancy was admitted to the hospital and recorded it in the medical records were correct, in spite of live evidence presented to the contrary by qualified witnesses. See *infra*, 5 – *they* were in fact the ones that were correct in their estimation of Nancy's medication levels as found in non-confrontable hearsay testamentary evidence, *not* Nancy's permanent board certified neurologists, or Stanford's own neurology consult. Martin thus declares that the *medical error* was in fact *correct*, and the mother was *abusing her daughter* by following her board certified neurologists well documented instructions. This formed the most serious "finding" that there was a "history of abuse and neglect" that never existed in fact.

Martin denied the parents' petition in favor of the State's for six requested powers of conservatorship over that of the parents, "*without conditions or limitation*" and for an indefinite period. These powers prevent any future opposition to SARC abuse. A perfunctory one-year review due in October, 2004, as required by Cal. Prob. C. §1850 in 2004, which was relied upon by the District Court in its denial opinion (App., *infra*, 7a) as proving that available state due process was adequate to protect Nancy's rights (App., *infra*, 10a), was never held. This ruling constitutes a premature death sentence for Nancy Golin.

H. *Succeeding Petitions For Appeal*

The parents filed for a new trial with affidavits objecting to and documenting the errors of the trial court. Martin denied it in January 2004[18]. In December 2003, the parents filed a notice of appeal from the conservatorship orders in the State Court of Appeals for the Sixth District. The parents are convinced that the trial testimony fully supports their position, and if procured, would show that the Martin court abused its

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[18] The State at that hearing verified that Nancy now has an undisclosed life threatening condition justifying *their* continuing custody, but now the parents cannot obtain any medical records about it; Martin appointed the state conservator during the appeal contrary to *Gold v. Superior Court of Marin County*, 90 Cal.Rptr.161 (1970).

discretion on nearly every point of law and finding in this case. Just as the parents had paid for a large part of the transcripts, the state appeals court shut down their appeal on December 2, 2004, by denying parents' request for an extension of time to file an opening brief to procure the rest of the oral record their attorney Mr. Gilg needed. The parents filed and were finally granted leave to proceed *in forma pauperis* by the Court of Appeals in January 2003. They then moved the state appeals court and then to the superior court to provide transcripts citing this Court's equal protection analysis of *M.L.B. v S.L.J.*, 519 U.S. 102 (1996) and *Conservatorship of Roulet*, 23 Cal.3d 219 (1979). That request was twice denied by the State Sixth District Court of Appeals without comment, contravening this Court's holding.

The parents see no remedy in state court at this point.

I. *Procedural history of habeas petition*

The parents filed two petitions for Habeas Corpus on their daughter's behalf *in propria persona* with the Santa Clara County Superior Court Probate Division, Hon. Catherine A. Gallagher presiding, in November 2002 and February 2003. Each was considered on briefs and denied without a hearing. In her second decision (App., *infra*, 26a), Judge Gallagher herself could modify the visitation restriction upon which she felt excused to deny the writ.

Due to immediate health concerns about his daughter, an emergency petition was presented to the US District Court for the Northern District of California, Hon. William A. Alsup, presiding, filed on June 20, 2003 by Mrs. Golin's attorneys (*Golin v. Allenby*, Dist. Case #3-03-cv-02889) on their daughter's behalf, seeking an evidentiary hearing and discovery. First it languished, and then parents got a new attorney and then several hearings. The Alsup court held it did not have jurisdiction due to failure to exhaust state remedies, and did not reach the question of an evidentiary hearing or discovery.

Concerned with urgency, on advice of his similarly concerned attorney Mr. Conner, Mr. Golin brought his petition *pro se* directly to the California Supreme Court in November 2003 where it was quickly denied review without comment (App., *infra*, 11a). Judge Alsup hastily dismissed the District Court peti-

tion without prejudice on November 24, 2003 (App., *infra*, 12a) just one day before the requisite State Supreme Court denial (App., *infra*, 17a). A supplementary *pro se* petition to the State Supreme Court, more current and complete than the first, was also denied on December 23, 2003 (App., *infra*, 11a)

Having satisfactorily met state exhaustion requirements now, Mr. Golin immediately refiled the parents' federal habeas petition *pro se* in District Court, Hon. William Alsup once again presiding, December 29, 2003, (*Golin v. Allenby*, Dist. Case #3-03-cv-05855).

Meanwhile in October 2003, the parents had filed *pro se* a long planned collateral Section 1983(5) civil rights suit against the State, Santa Clara County, City of Palo Alto, SARC and APS, and various state actors with the US District Court, Northern District of California, Judge Alsup again presiding, seeking tort damages and redress of constitutional grievances (Dist. Case #3-03-cv-04752).

The parents also filed a petition for an *Ex Parte Young* 209 U.S. 123 (1908) temporary injunction against the state officials named enjoining them from continuing their unconstitutional conduct during the pendency of the suit, including denying the daughter her First Amendment rights of familial association with her parents under DDS's appointed powers to control social contacts. That motion was terminated without a hearing or a ruling when the file was closed.

He heard defendants FRCP Rule 12(b)(6) motions to dismiss and dismissed it without leave to amend after one hearing, March 25, 2004. Judge Alsup denied the parents' claims of standing to represent their daughter as next friends despite *Whitmore*, merely deferring to the very same erroneous findings of the State Court that the parents sought to challenge with their Habeas petition. He further based his denial on domestic relations, *Rooker-Feldman* and *Younger* abstention doctrines. He dismissed the renewed Habeas petition (App., *infra*, 7a) at the same time he dismissed the Section 1983 petition. Mr. Golin appealed this §1983 denial to the Ninth Circuit Court of Appeals in May 2004 where it is currently being briefed (*Golin, et al v. Allenby, et al*, Case #04-15900).

The District Court appeared to have been caught by sur-

prise with extreme irritation at the rapid turnaround in habeas state exhaustion, saying (App., *infra*, 7a), "*The Golins now purport to have exhausted their state remedies*" (emph. added), whereas in the court's first dismissal without prejudice, it correctly prescribed the federalism and comity requirement that petitioner give "*the highest California court a fair opportunity to rule on the merits of the claims*" (App., *infra*, 16a), as was done. The renewed habeas petition languished; no formal hearing was ever permitted by the Alsup court and no reply was ordered. The respondent State defaulted in filing an answer, yet the District Court refused to enter a noticed default.

Mr. Golin appealed *pro se* the denial of the habeas to the Ninth Circuit Court of Appeals in May 2004 (*Golin v. Allenby*, Cir. Case #04-159220). Judge Alsup *sua sponte* denied a Request for a Certificate of Appealability (COA) (App., *infra*, 4a). Through inadvertence and error, because of general lack of expertise as a *pro se* petitioner, Mr. Golin failed to notice the time requirements and file a timely motion with his arguments for a COA with the Ninth Circuit Court of Appeals when he filed his appeal. The reviewing Court of Appeals thus *sua sponte* denied its COA without comment before Mr. Golin was able to present his arguments (App., *infra*, 3a). Mr. Golin retained an attorney Mr. Gilg and leave was granted for him to filed a motion to reconsider the denial of the COA (App., infra, 2a), but the Court below denied this motion without comment and dismissed the appeal on September 14, 2004 (App., *infra*, 15a). The court below would not comment on their ruling, as a motion for reconsideration. It is that denial that we appeal here for review, and the denial of the District Court petition for habeas review.

A Petition for Certiorari to the California Supreme Court from the denial of a Petition for Review of a Writ of Mandate for the State conservatorship proceeding is concurrently being submitted to his Court. We will cross-reference the Statement of the Case in that Petition here.

No court has yet proceeded to a fair hearing on the merits of a habeas review, and this is desperately needed.

J. *Current Status of Nancy Golin*

It is mental cruelty to Nancy to be separated from her parents. Nancy is always delighted to see her parents and de-

pressed to see them leave. We are the only family she has ever known. Her security and innocent trust are battered when her parents appear, seeming indifferent to her plight by not responding to her desperate efforts to be taken home. This creates the appearance in her immature mind of rejection and collaboration of her parents in dumping her in State custody. SARC thus forces the parents to become their accomplices in abuse of Nancy.

SARC has done its most to sever family ties, barring parents at birthdays, Christmas, Thanksgiving, Easter, Halloween and family outings. Visits have been terminated for many months especially at times she is injured or ill. Martin approved SARC-requested authority to impose supervised visitation[19]. SARC would not approve any neutral supervisor. When they were able to see her, SARC limited parents to one 4hrs/wk scheduled visit at Nancy's RCF only. The parents could walk outside with her for 2hrs/wk. only with a chaperone. The parents have not seen their daughter without supervision for three years and no end is in sight. Yet the parents did nothing wrong. SARC's motive is purely retaliatory against the parents since SARC does not even bother to rationalize these restrictions except as a means to justify themselves by demonizing the parents.

Parents never missed a scheduled visit and indeed protested they are unable to visit her more. Nancy sits by the door whenever a visit is scheduled and bounds out the door when the parents come, and is despondent whenever there is a schedule change or she has to return to the care home. Careworkers observe Nancy to be especially affectionate with her parents. Now they cannot see her at all.

On December 3, 2004, during a visit with Nancy a careworker staged a fabricated tantrum, causing an uproar which the home used to claim the parents were supposedly being disruptive and cut off visits completely, This is a standard tactic by SARC. Now the parents are cut off from visits, just before

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[19] A search of cases and statutes found no authority under probate law for a court to impose visitation restrictions between consenting non-criminal adult family members, and we contend there is none.

the holiday season, and Nancy cannot see her family let alone go home for the holidays.

SARC is rapidly destroying Nancy. Her parents fear further delay. She is suffering from tardive dyskinesia from drugging (tremors, involuntary lip and tongue movements, head contracted towards shoulder, and muscle rigidity). Her hand often shakes from tremors due to the long term off-label use of psychotropics that she is often unable to feed herself without someone guiding her hands. The parents cannot have other doctors see her or obtain records from her caregivers. She still has seizures, but to maintain the pretense the parents negligently failed to control them[20], seizures are well concealed. Her care is still being supervised by SARC GP Masada, who improperly resumed Zyprexa resulting in her being hospitalized in serious condition in 2003 and lied about her condition.

She is now bent over like an old woman and has imminent tooth loss from 20% bone loss due to osteoporosis due to the resumption of Dilantin for anti-seizure medication in November 2001 that the Golins warned against[21]. Where she used to appear completely normal in public and be able to run and hike all day and feed herself she is suffering from muscle rigidity from the psychotropic drugging to the extent that she can only walk and move very slowly. Except for caregivers, she mostly sees only retarded people. She shares a tiny room with a severely retarded girl that rocks violently and grunts all day, and spends most of her time in bed. She has had no urgently needed dental care for three years. The parents saw signs she is still being physically and chemically restrained behind their backs. The parents are unable to protect their daughter and are either lied to or told to mind their own business.

This is precisely the kind of mistreatment and potential for premature death in state care the parents feared, and sacrificed all their lives to protect her from.

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[20] All epileptics have occasional breakthrough seizures.

[21] When SARC dentist Santos echoed parents' warnings of imminent tooth loss from Dilantin August 2003, SARC'S neurologist advised switch to Phenobarbital alone, just as Mrs. Golin's neurologist did; SARC's nurse stopped her to avoid vindicating Mrs. Golin.

REASONS FOR GRANTING THE PETITION

First and foremost, the District Court erred by summarily rejecting the parents' standing to represent their daughter as next friends without a hearing or requiring a reply, based entirely on the very same three egregiously falsified findings of the state trial court concerning the parents (App., *infra*, 8a) they seek to challenge as erroneous in this Habeas petition, which "*resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding*" (28 U.S.C. §2254(d)(2))

Second the District Court held to the unreasonable proposition that because *the state itself* was appointed Nancy's conservator, *only the state had standing* to represent her interests, ignoring the irrational conflict of interest this would pose where only the state had standing to sue themselves for wrongful custody and control.

Thirdly, it mistakenly contended that the *Rooker-Feldman* doctrine somehow bars federal Habeas review of state court decisions ("relitigation") (App., *infra*, 10a), whereas it is well-settled law that the *Rooker-Feldman* doctrine does not touch the writ of habeas corpus.

Fourthly, it denied federal habeas subject matter jurisdiction relying inappropriately on *Lehman v. Lycoming County Children's Services*, 458 U.S. 502 (1982). Lyman applied to the state custody of a minor foster child rather than an incompetent adult seeking freedom from unconstitutional state custody and control. We will argue that the "traditional area of state concerns" are more narrowly constrained to family and juvenile law matters, and exceptional cases such as this involving conspiratorial state conservatorship rip-offs constitute basic constitutional liberty issues, not requiring "*an unprecedented expansion of the jurisdiction of the federal courts*" threatening to clog already overcongested federal dockets.

Fifthly, the court below ignored federal court holdings mandating that the courts treat all allegations in a habeas petition as true in summary dismissals where no hearing was held and no reply was ordered (e.g., *House v. Mayo*, 324 U.S. 42 (1945)), instead of trusting the state opinion .

Lastly, we will show that the false and intuitively unreasonable findings of the state trial court on which Judge Alsup relied to deny parents' next friend standing, were based almost entirely on written "testimentary evidence" barred by the Confrontation Clause, and by the "new rule" of *Crawford v. Washington,* 541 U.S. 36 (2004), which we will argue must now extend to any nominally civil proceeding where a person stands likely to lose his liberty, and that the "*a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable*"(28 U.S.C. §2254 (e)(2)(A)(i)) now exists retroactively to support our request for remand for further considerations in light of *Crawford.*

II. THE DISTRICT COURT ERRED DENYING THE PARENTS NEXT FRIEND STANDING TO REPRESENT THEIR DAUGHTER

A. *PARENTS CLEARLY MEET THE* WHITMORE *TEST FOR NEXT FRIEND STANDING.*

FRCP Rule 17(c) provides an alternative basis for standing for incompetents or infants, as "next friends". The test for next friend qualification is governed by Most frequently "next friends" appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves.

There are three requirements for "next friend" standing *(Whitmore v. Arkansas,* 495 U.S. 149 (1990)). First the "next friend" must provide "*an adequate explanation, such as inaccessibility, mental incompetence, or other disability, why the real party in interest cannot appear on her own behalf to prosecute this action*". (*Id,* at 163, 165.) Here the entire habeas petition explains and satisfies this requirement. Nancy is incompetent and is involuntarily committed to a state home pursuant to the state court's conservatorship order. There is no way in the world that she could bring this petition herself.

Secondly, the "next friend" must be "*truly dedicated to the best interests of the person on whose behalf he or she seeks to litigate*", and thirdly "*must have a significant relationship with the real party in interest*" (*Id.* at 164). The burden is on the

"next friend" to clearly establish the propriety of his or her status and thereby justify the jurisdiction of the court. (*Id.* at 163-164.)

In this matter, there is no doubt that the petitioners, who are the natural parents of Nancy, the real party in interest here, are truly dedicated to the best interests of Nancy. The District Court essentially admitted same in its April 6, 2004 Order dismissing this petition. The lower court acknowledged that this was the second federal habeas petition brought by petitioners on behalf of Nancy, that the petitioners had personally litigated their petition for conservatorship of Nancy without an attorney in a three-week probate court trial, that they had appealed that adverse decision, and that the petitioners had also filed a 42 U.S.C. §1983 action in District Court, which they are appealing in the 9th Circuit. In short, there can be no denying that the petitioners are "truly dedicated" to the best interests of Nancy. (*Id.* at 163)

Here, moreover, the parents have never abandoned their child or shown any lack of interest in her welfare, and have loved, cared and responsibly provided for her essentially all her life. There is total agreement between the parents about what is in her best interests. Nancy, on the other hand, is totally attached to her parents. There is no doubt that a significant relationship therefore exists.

Thus petitioners have met their burden of proof and should be accorded "next friend" status. However the District Court in its April 6, 2004 Order disputes that the petitioners have met their burden of proof because the state probate court had found that respondent would serve as a better conservator than petitioners.

In any event reasonable jurists would certainly question or disagree the District Court's ruling on petitioners' "next friend" status in this matter. In his dissenting opinion in *Lehman v. Lycoming County Children's Services*, 458 U.S. 502 (1982) the case the District Court relied on in its April 6 order dismissing this opinion, Justice Blackmun, with whom Justice Brennan and Marshall joined in, stated that a natural parent "*remains a proper next friend to apply for the federal habeas writ on behalf of her natural children.*" (*Id.* at 523.) It may be presumed that

these three justices would qualify as "jurists of reason".

B. *THE COURT BELOW ERRED PRESUMING THE RELIABILITY OF THE VERY SAME ERRONEOUS FINDINGS OF THE STATE COURT SOUGHT TO BE CHALLENGED BY HABEAS REVIEW*

For the District Court to merely rely unquestioningly on the very same state court findings challenged by the habeas petition to disqualify the parents as next friends was improper, a pure exercise in circular reasoning. At the very least, and especially since this is a *pro se* petition and based on this Court's policy of liberally construing *pro se* petitions (*Haines v. Kerner*, 404 U.S. 519, 520-521 (1972)), the District Court should have ordered respondent to file a response to this petition and ordered the respondent to expand the record pursuant to Habeas Rules 5 and 7. (See *Williams v. Kuliman*, 722 F.2d 1048, 1050-1522 (2nd Cir.1983); see also *Wilson v. Phend*, 417 F.2d 1197 (7th Cir. 1969) [habeas allegations presumed to be true in these circumstances].)

C. *DISTRICT COURT OPINION WOULD MEAN ONLY STATE HAS STANDING TO SUE ITSELF FOR WRONGFUL CUSTODY*

Furthermore there is one very serious problem of inverted logic in the District Court opinion, where it implies that since the state was appointed conservator, only they might have legal standing to represent Nancy in a habeas corpus suit, saying:

> *"It would thus appear that respondent, if anyone, would have standing to challenge Nancy's custody (assuming she is in custody)"* (App., *infra*, 9a).

Any jurist of reason would clearly have a serious problem reaching this absurd conclusion, because in this case the *respondent* just happens to be the *state* custodian DDS itself whose custody and control is being challenged. Would the matter be styled, "*Allenby v. Allenby*"? Clearly Nancy cannot represent herself, and it would appear that the only representative acceptable to the state or District Court is the state itself. This would be like holding that an incompetent prisoner might only be represented by the jailer himself, a sure prescription for a life sentence.

Moreover, the roles of a conservator are different from the role of a next friend or a *guardian ad litem*, and require different qualifications[22]. The role of a conservator is to protect the *welfare* of the conservatee, whereas the role of the *guardian ad litem* or next friend is to protect the *legal rights* of the conservatee, only for an individual case.

D. *FOLLOWING CRAWFORD, NEW CONFRONTATION CLAUSE EVIDENCE RULES MUST EXTEND TO NOMINALLY CIVIL COMMITMENT MATTERS FROM GAULT / WINSHIP DECISIONS*

This Court since the October 2003 conservatorship trial (May 2004) revitalized the Confrontation Clause of the Sixth Amendment in *Crawford v. Washington*, 541 U.S. 36 (2004) as applied to a criminal proceeding. This court should now address the next compelling question: whether the new rule of *Crawford* should extend to nominally civil commitment proceedings where a person faces total loss of their personal liberty in a civil commitment proceeding.

This Court has already ruled that a family's rights to association, governing the rights to appointed counsel in a child dependency hearing on a case by case basis, in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) and the right to criminal due process to a person likely to lose their liberty in a civil proceeding *In re Gault*, 387 U.S. 1 (1967) and *In re Winship*, 397 U.S. 358 (1970) are the same as defendants in a criminal to trigger Sixth Amendment rights to criminal due process protection.

> *"...commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" (Gault, supra, at 50)*

A few lower state courts since *Crawford* have already held that *Crawford* applies to civil commitment or civil juvenile proceedings qualifying as valid exercises of the sixth amendment rights of confrontation of witnesses, (See *In re Commitment of GGN*, 855 A.2d 569 (2004), *Snowden v. State*, 156 Md.App. 139 (2004), *Civil Commitment of EST*, 371 N.J.Super. 562, *In re*

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[22] see "*Role of the Attorney for the Alleged Incapacitated Person*", Joan O'Sullivan, 31 Stetson L. Rev. 687, Stetson Law Review, Spring 2002

Civil Commitment of A.X.D., 370 N.J.Super. 198 (2004)[23]). This is squarely on point here for reasons we will discuss as follows.

E. *FALSE STATE FINDINGS RESTED ON EVIDENCE BARRED RETROACTIVELY BY NEW RULE OF* CRAWFORD *JUSTIFYING REMAND*

The underlying core fact is that the three principal findings of the State court upon which Alsup rested his jurisdictional conclusion disqualifying the petitioners as next friends were plainly wrong and not the product of a reasonable factfinder.

There simply was no evidence that any "*history of neglect and abuse*" had ever existed, outside of SARC's constant recitation of that inflammatory stock phrase; that the parents may have had a spirited or even contentious relationship at times over their 42 year marriage, but that on the matter of their daughter they always harmonized and worked cooperatively and effectively – even overcautiously at times -- in their view of what was in her best interests, never causing any harm to her; that Martin's endorsed "*history of continuous conflicts with most medical and other professionals*" did not explain how the parents managed to get along well for years with truly professional highly qualified board certified experts they chose themselves who completely met Nancy's medical needs. The "*other professionals*" mainly whose noses are out of joint here are *SARC's own* putative "professionals", who the parents see from long experience as *un*professional and unethical.

The truth was that the state abused Nancy and not the parents, that the conservatorship bid represented their efforts to cover up their own abuses and immunizing themselves from legal liability while they profited from Nancy's confinement, and these blatantly erroneous findings would not have been possible if proper Sixth Amendment constitutional due process safeguards had been applied.

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[23] See reviews, *"Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection, Crawford v. Washington,"* Criminal Justice Summer, 2004 Feature, Richard D. Friedman, 19 SUM CRIM JUST, and *"Hearsay and the Confrontation Clause"*, 77-MAY Wis. Law. 16, Wisconsin Lawyer, May, 2004. Steven M. Biskupic, 77-MAY Wis. Law. 16

Reading the record carefully and critically, one discovers that practically Martin's entire decision rests in some way or another on unreliable testamentary hearsay evidence admitted under a business records exception to hearsay rule, especially hospital records Cal. Evid. C. §1270, which was underpinned by the indicia of presumed reliability rule of this Court's former holding in *Ohio v. Roberts,* 448 U.S. 56, 62-66 (1980) overruled by *Crawford.*

That the evidence cited is "testimentary" under the new *Crawford* standard is undoubted. If one merely scans the state court opinion it is not instantly clear that the lengthy citation of disparaging ER doctor Bason-Mitchell's was derived from a *hospital report.* Bason-Mitchell did *not appear.* The State made no effort to call him. The Bason-Mitchell emergency room record criticizing the parents in Martin's decision reaches conclusions diametrically opposite to that of live expert witnesses who actually appeared: Dr. Jerome Kaplan [who opined from reviewing the entire medical record] and Dr. Duc Nguyen, [orthopedics], Dr. Hector Cerezo [psychiatry] and Dr. Sarah Gaskins [neurology]. Not only would Dr. Bason-Mitchell not be able to be qualified by the court on the subject of psychotropic medications, but he was not shown by the state to be unavailable or have been previously cross examined, both tests under *Crawford.* Radiology-trained psych doctor Chris Hayward cited extensively by Martin to the effect that Mrs. Golin was overdosing her daughter on anti-seizure medications did not appear either. Not trained in neurology, Hayward's written records were contradicted by Stanford neurology consults and live medical expert witnesses that did appear and were cross-examined.

Retroactivity should apply to the instant case in applying the new rule of Crawford, according to the rule of *Teague v. Lane,* 489 U.S. 288 (1989).

III. COURT BELOW ERRED VIEWING FEDERAL HABEAS AS "RELITIGATION" OF CONSERVATORSHIP BARRED BY FELDMAN

The court below clearly was wrong in summarily dismissing petitioner's habeas petition for lack of jurisdiction arguing the petitioners were merely "relitigating" what had transpired in

the state court conservatorship proceeding, citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 486 (1983) (App., *infra*, 9a-10a). This preclusion doctrine merely expresses the fact that Congress never "*expressly authorized*" the lower federal courts with jurisdiction to act as courts of appellate jurisdiction over final decisions of a state court as established by Article III, Section 1 of the US Constitution (U.S. Constitutional Article III, Section 1). However, it is well settled that *Rooker Feldman* does not touch the writ of Habeas Corpus as Congress clearly did "expressly authorize" the lower federal courts to exercise exceptional jurisdiction over these matters under 28 U.S.C. §2251, *See Plyler v. Moore*, 129 F.3d 728, 732 (4th Cir.1997); *(other citations omitted)* and in fact *requires* the hopeful petitioner to *exhaust* state remedies before seeing federal lower court review. Therefore the District Court was wrong in denying both the writ and the COA for that particular reason.

IV. PETITIONERS' REQUEST FOR A COA CLEARLY MET STATUTORY REQUIREMENTS

A COA must issue if:

> *"jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."*

Slack v. McDaniel, 529 U.S. 473, 484 (2000), 28 U.S.C. §2253(c). If the district court dismisses a petition on procedural grounds without reaching the merits as it did here, the test for whether a court of appeals judge should grant a COA is slightly different than the substantial showing requirement in other cases. The test here is two-fold: (1) is it debatable that the petition states a valid claim of denial of a constitutional right, (2) is it debatable that the district court's procedural ruling is wrong.

As set forth here, we have made the requisite showing.

A. *COURT BELOW MUST DEEM PETITIONER'S ALLEGATIONS AS TRUE IN CASES LIKE THIS*

Where the District Court denied petition for writ of habeas corpus without requiring respondent to answer and without a hearing, the court must assume that petitioner's allegations

were true. *House v. Mayo*, 324 U.S. 42 (1945), *reh'g denied*, 324 U.S. 886; see also, *Lunce v. Overlade*, 244 F.2d 108 (7th Cir., 1957); *Wilson v. Phend*, 417 F.2d 1197 (7th Cir. 1969) . However, here the District Court erred because it relied not on the petition itself but unreliable allegations antecedent to the petition, relying on the very same false findings of the state court sought to be challenged by the petitioners by habeas review.

B. *SUBSTANTIVE SHOWING OF DENIAL OF A CONSTITUTIONAL RIGHT WAS MADE*

Here our petition and this application for a COA satisfies the requirement for the showing of a denial of a constitutional right, by showing several egregious constitutional due process and equal protection violations, violations of both liberty and associational interests, First Amendment freedom of familial association, Fourth Amendment freedom from unreasonable personal seizures, Fifth Amendment rights to due process, Sixth Amendment rights to effective counsel, jury rights, the right to confront witnesses and, Eighth Amendment rights to freedom from cruel and unusual punishment, rights deriving from the Due Process Clause of the Fifth Amendment, and rights under the Fourteenth Amendment to equal protection right to a transcript on appeal.

We cite federal constitutional questions relating to family associational rights per *Santosky v. Kramer*, 455 U.S. 745 (1982), *Troxel v. Granville*, 530 U.S. 57 (2000), handicapped rights per *Olmstead v L.C. by Zimring*, 527 U.S. 581 (1999), mental health rights *O'Connor v. Donaldson*, 422 U.S. 563 (1975) and *Parham v. JR*, 442 U.S. 584, 602 (1979), *Washington v. Harper, 494 U.S. 210 (1990)* (psychotropic drugs), and *M.L.B. v S.L.J.*, 519 U.S. 102 (1996) for transcripts to indigent persons on appeal.

V. THE COURT BELOW HAD FEDERAL HABEAS SUBJECT MATTER JURISDICTION

A. *PARENTS SEEK TO LITIGATE DAUGHTER'S BEST INTERESTS BY HABEAS NOT THEIR OWN*

In his opinion, Judge Alsup states,

> *"Federal habeas corpus, however, has never been available to challenge parental rights or child custody. See Lehman v. Lycoming County Children's Services, 458 U.S.*

505-11 (1982). A federal habeas petition challenging a state's child-custody determination simply seeks to relitigate the petitioner's interest in his or her own parental rights." (App., infra, 9a-10a)."\

First, what the District Court says here is untrue. A "next friend" does not himself or herself become a party to the habeas corpus action in which he participates, he or she simply pursues the cause on behalf of the detained person who remains the real party in interest. (Id., at 162-163.)

Furthermore, the presumption contained here reveals with stark clarity the lack of perception of public attitudes towards the retarded reflected by the Alsup opinion. The parents are *not* seeking to relitigate *their own* "parental" rights, but to unselfishly assert and defend the liberty interests on behalf of their daughter, as they know them best! They project her as an adult human being notwithstanding her mental rétardation, with her own thoughts, emotions and rights to liberty and familial association. Without the parents coming to her defense, Nancy Golin would have no rights of her own at all. She is a mute, helpless person, a ready-made victim of state exploitation, who relies on her caring parents entirely for protection. The parents have demonstrated through constant sacrifice and service to their daughter's needs that they literally do not care about their own rights, only those of their daughter as a lifetime of experience has taught them to understand. As held by this Court in *Troxel v. Granville*, 530 U.S. 57 (2000), here the parents' estimation of what is in their child's best interests should be accorded great deference, even more so here after *34 years* of experience and concern. Being an involved lifelong parent of a developmentally disabled child gives one an extraordinary viewpoint that the court below, the state and other casually interested parties simply cannot begin to understand.

While the court below may style this as a "child custody" matter even though Nancy is an adult child not a minor child the core of the matter is not so much Nancy's custody, but her personal freedom to simply enjoy life with her family and others she loves, as she desires. She has so little in life that she is able to do, why deprive her of the one simple pleasure she enjoys the most, a loving family environment with the one secure dependable thing in her life, her parents?

B. *LEHMAN* IS INAPPOSITE HERE[24]

Lehman concerned state parental termination proceedings that placed the minor children in foster homes. Mrs. Lehman filed a federal petition for a writ of habeas corpus to get her children back, challenging the constitutionality of the state parental termination laws. The High Court rejected the parent's petition on the grounds that the children were in foster homes, thus there was no restraint on the children's liberty and thus they were not "in custody". (Id, at 504-508, 510-511.) Being in custody is a prerequisite for habeas relief (28 U.S.C. §2241(c)(3), 28 U.S.C. §2254(a); see also *Jones v. Cunningham* 371 U.S. 236, 240 (1963))

The *Lehman* court held that:

> *"The State's interest in finality is unusually strong in child-custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents.".*

Here the facts are dramatically distinguished from those in *Lehman*. A stable, *very* long-term, continuous relationship had *already been* established with parents, and *it is the state* that is prolonging uncertainty. The state keeps shifting her around from facility to facility, with caregivers changing every six months or so, constantly interfering with Nancy's secure access to her parents.

Here, Nancy Golin is an adult child in an unnecessary state probate conservatorship defined not so much by traditional state child custody and family law matters, but governed by constitutional liberty interests, not the narrow strictures of domestic relations matters traditionally areas of state concern. She is a non-dangerous and non-criminal mentally handicapped person wrongfully confined in state custody who is capable of living safely in the care of her family, and she has expressed her wish in every way she knows how that she wants

---

[24] See the critical review, "*The Continuing Diminished Availability of Federal Habeas Corpus Review to Challenge State Court Judgments: Lehman v. Lycoming County Children's Services Agency*", Ira P. Robbins and Susan M. Newell, 33 Am. U. L. Rev. 271 (1984)

to go home to her family and lifelong companions whom she has known and loved essentially her entire life.

The *Lehman* Court stated in footnote (fn 12):

> *"We express no view as to the availability of federal habeas when a child is actually confined in a state institution rather than being at liberty in the custody of a foster parent pursuant to a court order."* (*Id.* at 511)

There can be essentially no argument that Nancy is in state custody. Here Nancy is confined for what will undoubtedly be a short lifetime sentence in a state adult care facility conserved directly by the state. The adult care facility is owned and operated by state employees who act under the exclusive, close supervision of her state conservators respecting the tiniest detail, who have "suspended all her civil and legal rights for an indefinite period". It is well established that an involuntary civil commitment in a state hospital results in "custody" status for federal habeas corpus purposes. (*Tyars v. Finner,* 709 F.2d 1274, 1279 (9th Cir. 1983).)

Justice Blackmun additionally explained that the Court's majority opinion left open

> *"the possible availability of federal habeas if a child is actually confined in a state institution, rather than in the custody of a foster parent pursuant to a court order."* (emphasis added) (*Id.* at 524)

Thus again in the *Lehman* case relied upon by the District Court we have three Supreme Court justices who joined in a dissenting opinion disagreeing with the majority. Hence again petitioners have established that reasonable jurists would question or disagree with the District Court's dismissal. (See 28 U.S.C. §2253(c); see also *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)). Hence the petitioners have raised constitutional issues cognizable in a federal habeas corpus petition. A certificate of appealability should therefore be issued.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted, December 12, 2004

_____, _____

Jeffrey R. Golin Elsie Y. Golin

13736 De Leon Ave., Santa Nella, CA 95322

APPENDIX A

OPINIONS AND ORDERS BELOW

Page	Attachment
1a	September 14, 2004, US Circuit Court of Appeals, 9th Circuit, Order Denying Motion for Reconsideration of Request for Certificate of Appealability, Dismissing Petition for Writ of Habeas Corpus (04-15922).
2a	July 16, 2004: US Circuit Court of Appeals, 9th Circuit, Order Granting Extension of Time to File Motion for Reconsideration of Order Denying Request for Certificate of Appealability (04-15922)
3a	June 22, 2004: US Circuit Court of Appeals, 9th Circuit, Order Denying Request for Certificate of Appealability (04-15922)
4a	May 12, 2004: US District Court, Northern District of California, Denial of Certificate of Appealability (3-03-cv-05855)
7a	April 6, 2004: US District Court, Northern District of California, Order Dismissing Petition for Habeas Corpus (3-03-cv-05855)
11a	December 23, 2003: Order of California Supreme Court Denying Supplementary Petition for Writ of Habeas Corpus (S120778).
12a	November 25, 2003: Order of California Supreme Court Denying Petition for Writ of Habeas Corpus (S120264)
13a	November 24, 2003. US District Court, Northern District of California, Order Dismissing Petition for Habeas Corpus without prejudice (3-03-cv-02889), failure to exhaust.

BEST AVAILABLE COPY

Page Attachment

19a May 15, 2003: Order of Superior Court, Santa Clara County, Denying Petition for Writ of Habeas Corpus (1-02-PR-151096)

FILED
SEP 14 2004
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

ORIGINAL

FOR THE NINTH CIRCUIT

ELSIE GOLIN; et al

Petitioners –Appellants,

v.

CLIFF ALLENBY, Director of California Department of Developmental Services, Respondent - Appellee.

No. 04-15922

D.C. No. (043-05855-WHA)
Northern District of California, San Francisco

II. **ORDER**

Before: HUG and RAWLINSON, Circuit Judges.

Appellant's motion for reconsideration, received July 30, 2004, is ordered filed, and is denied. *See* 9th Cir. R. 27-10. All outstanding motions are denied. No further filing shall be accepted in this closed docket.

FILED
JULY 16, 2004
CATHY A. CATTERSON, CLERK
US COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELSIE GOLIN; et al.,
Petitioners - Appellants,

CLIFF ALLENBY,
Director of California
Department of
Developmental-Services,
Respondent - Appellee.

No. 04-15922

D.C. No. CV-03-05855-WHA
Northern District of California,
San Francisco

I. ORDER

Appellant's request for an extension of time to file a motion for reconsideration, received July 7, 2004, is ordered filed, and is granted. Appellant's motion for reconsideration is due 14 days from the date of this order.

For the Court
s/_____
Vivian Fu
Staff Attorney, Deputy
Clerk
General Orders/Appendix A

FILED
JUN 2 3 2004
CATHY A. CATTERSON, CLERK
US- COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELSIE GOLIN; et al.,

Petitioners - Appellants,

CLIFF ALLENBY, Director of California Department of Developmental Services,

Respondent - Appellee.

No. 04-15922

D.C. No. CV-03-05855-WHA
Northern District of California, San Francisco

II. ORDER

Before: RYMER and McKEOWN, Circuit Judges

The request for a certificate of appealability is denied. *See 28 U.S.C.* 2253(c)(2). The briefing schedule set on May 11, 2004 is vacated.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
JUNE 23, 2004
By: s/BradleyYbaretta
Deputy Clerk

FILED
JUN 2 5 2004
RICHARD WEIKING, CLERK,
U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED
2004 MAY 12 PM 4:32
RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST OF CA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 03-05855 WHA

ELSIE Y. GOLIN and JEFFREY R. GOLIN,
Petitioners
v.
CLIFF ALLENBY, Director of the California Department of Developmental Services,
Respondent,
and
NANCY GOLIN,
Real Party in Interest

DENIAL OF CERTIFICATE OF APPEALABILITY

This is a habeas case under 28 U.S.C. 2254 filed pro se by petitioners Elsie Y. Golin and Jeffrey R. Golin on behalf of their adult, developmentally-disabled daughter Nancy Golin.

Respondent Cliff Allenby of the California Department of Developmental Services is Nancy's conservator. The petition filed herein challenged respondent's appointment as Nancy's conservator. The petition was dismissed on April 5, 2004. Judgment was thereafter entered on April 6, 2004. Mr. and Mrs. Golin have filed a notice of appeal. Although they do not request a certificate of appealability, the notice of appeal will be deemed a request for the certificate. See *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

A petitioner may not appeal a final order in a federal habeas corpus proceeding without first obtaining a certificate of appealability (formerly known as a certificate of probable cause to appeal). 28 U.S.C. 2253(c); Fed. R. App. P. 22(b). A judge shall grant a certificate of 4 appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). The certificate must indicate which issues satisfy this standard. Id. at 2253(c)(3).

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy Section 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In this case, however, the dismissal was based on issues antecedent to the merits. Section 2253(c)(1) also applies to an appeal of a final order entered on procedural issues antecedent to the merits, for instance a dismissal on standing and jurisdictional grounds, as here. Ibid.

Determining whether a certificate of appealability should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Id. at 484-85.When the district court denies a petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id* at 484. As each of these components is a "threshold inquiry," the district court "may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Id. at 485. Supreme Court jurispru-

dence "allows and encourages" district courts to first resolve procedural issues, as was done here. Ibid. The petition in this case was dismissed for two reasons. First, the Court held that Mr. and Mrs. Golin lacked standing to seek federal habeas relief on behalf of their daughter. Notwithstanding an order of a state probate court appointing respondent as Nancy's conservator after a three-week trial, the Golins attempted to proceed as Nancy's next friend. The Court found the Golins had failed to meet the test for next-friend status. Second, the petition was dismissed on jurisdictional grounds. The primary focus of the Golins' petition was their contention that they, rather than respondent, should have been appointed Nancy's conservator.

The Court found that the Golins could not seek to relitigate a determination of parental rights or child custody via a federal petition for writ of habeas corpus. Jurists of reason would not find it debatable whether the Court was correct in its procedural rulings. As such, the certificate of appealability implied from the notice of appeal is DENIED. The Clerk of the Court shall transmit the file, including a copy of this order, to the Court of Appeals. Mr. and Mrs. Golin may then ask the Court of Appeals to issue the certificate, or if they do not, the notice of appeal will be construed as such a request.

IT IS SO ORDERED

Dated: May 12, 2004.

S/ (WHA)
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

FILED
APRIL 6,2004
RICHARD W. WEIKING
CLERK, US DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

No. C 03-05855 WHA

ELSIE Y. GOLIN and JEFFREY R. GOLIN,
Petitioners
v.
CLIFF ALLENBY, Director of the California Department of Developmental Services,
Respondent,
and
NANCY GOLIN,
Real Party in Interest.

This is the second time the parties have appeared before this Court on habeas corpus.

On November 23, 2003, this Court dismissed the first petition of Jeffrey and Elsie Golin for writ of habeas corpus (No. 03-2889 WHA) for failure to exhaust administrative remedies. Mr. and Mrs. Golin were there represented by counsel. The first petition sought the release of Nancy Golin, the Golins' adult, developmentally-disabled daughter, who was then under temporary conservatorship. A copy of this Court's dismissal order is appended for the convenience of the Court of Appeals. The Golins now purport to have exhausted their state remedies. The instant petition was filed December 29, 2003. Mr. and Mrs. Golin, now proceeding in pro per, seek the same remedy - to regain the custody of their daughter.

The heart of the instant dispute arises out of a state conservatorship proceeding in the Santa Clara County Superior Court involving Nancy, who is 33-years old. The issue in

the state court was who would be appointed Nancy's conservator. The California Department of Developmental Services, acting through the San Andreas Regional Center, a not-for-profit corporation, and Embee Manor, where Nancy currently resides, petitioned the probate court for the appointment. Mr. and Mrs. Golin filed a competing petition.

Following a three-week trial (in which the parents represented themselves), the probate court found, based upon clear and convincing evidence, that Nancy lacked the capacity to provide for her own personal needs for physical health, food, clothing and shelter, and to manage her own financial resources. The court also concluded, again based upon clear and convincing evidence that Nancy's parents were unable to provide for Nancy's best interests.

The court made three specific findings, each by clear and convincing evidence, specific as to the Golins. *First,* the court found "that both Mr. and Mrs. Golin are presently unable to provide for the best interests of their daughter, Nancy Golin, because of their history of continuous conflicts with most medical and other professionals." *Second,* "a history of marital conflict between the parents rendered them unfit to serve as their daughter's conservator." *Third,* the court found that the Golins' had a history of neglecting and abusing their daughter, rendering them unable and unfit to provide for the best interests of Nancy as her conservator. As a result, the court appointed respondent Cliff Allenby, director of the Department of Developmental Services, as Nancy's permanent limited conservator. Attached to this order is a copy of the probate court's order, from which the Golins have taken an appeal, and of which this Court has taken judicial notice in a related civil suit described more fully below.

This order holds that Mr. and Mrs. Golin lack standing to seek federal habeas relief on behalf of their daughter. As mentioned, an order of the state court appointed respondent as Nancy's permanent limited conservator. The order expressly found the Golins incapable of taking care of their

daughter. It would thus appear that respondent, if anyone, would have standing to challenge Nancy's custody (assuming she is in custody).

The Golins, however, contend to be proceeding as Nancy's next friend. There is a test, however, for next-friend status. In determining whether a next-friend petition is appropriate in the circumstances of a particular case, courts consider the status of the third-party petitioner and the status of the person in custody on whose behalf the third party is seeking to act. These requirements are jurisdictional, and the third-party petitioner bears the burden of proving that both requirements are satisfied. The Golins have not met their burden on this record.

The Golins contend that:

> The State has failed both tests and on both tests Petitioners are the most effective representative available of Nancy Golin and therefore assert third party standing to represent Nancy Golin's interests as next friends.

Pet. 49. Such an assertion completely ignores the order of the probate court, which after a three-week trial found that Nancy's interests would be better served with respondent as her conservator rather than her parents. The probate court's finding specifically controverts the Golins' assertion that "No one has better claim than Petitioners to `next friend' status for the purpose of this proceeding, as we have demonstrably always put her interests ahead of our own" *(ibid.)*. This is sufficient to deny the Golins next-friend status.

This petition must be dismissed for another reason. The Golins' primary contention involves a disagreement with the probate court's appointment of respondent as Nancy's conservator. Federal habeas corpus, however, has never been available to challenge parental rights or child custody. See *Lehman v. Lycoming County Children's Services,* 458 U.S. 505-11 (1982). A federal habeas petition challenging a state's child-custody determination simply seeks to relitigate the petitioner's interest in his or her own parental rights. *Ibid.* A federal court has no jurisdiction to relitigate these interests - federal courts are not courts of appeal from state decisions. See *District of Columbia Court*

of Appeals v. Feldman, 460 U.S. 462, 482, 486 (1983). To extend the federal writ of challenges to state child-custody decisions based on alleged constitutional defects collateral to the actual custody decision would be an unprecedented expansion of the jurisdiction of the federal courts. *See Lehman,* 458 U.S. at 512.

The Golins' attack here on federal habeas (like their challenge under Section 1983) looks to relitigate those custodial rights squarely determined in the state court. Mr. and Mrs. Golin were given every opportunity to petition for the appointment as Nancy's conservator. They lost. The decision is on appeal. This is not the place to relitigate what happened below. Moreover, California law provides remedies to persons in petitioners' position. California probate courts have continuing jurisdiction over the conservatorships they impose. Each conservatorship is reviewed by the probate court one year after its establishment and biannually thereafter. Cal. Prob. Code §1850. Thus, the state court has exclusive and continuing jurisdiction over issues related to Nancy's conservatorship. If any constitutional challenges lie (a matter this order does not reach), they are within the purview of the probate court. This matter simply does not belong in federal court. The petition for writ of habeas corpus is **DISMISSED.**

Dated: April 5, 2004
WILLIAM H. ALSUP
UNITED STATES DISTRICT JUDGE

S120778

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In Re NANCY GOLIN on Habeas Corpus

Petition for Writ of Habeas Corpus is DENIED

SUPREME COURT
FILED
December 23, 2003
Fredrich K. Ohlrich, Clerk

Deputy

s/ George
Chief Justice

S120264

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In Re NANCY GOLIN on Habeas Corpus

Petition for Writ of Habeas Corpus is DENIED

Brown, J., was absent and did not participate

SUPREME COURT
FILED
November 25, 2003
Fredrich K. Ohlrich, Clerk

Deputy

s/ George
Chief Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELSIE Y. GOLIN, No. C 03-02889 WHA
Petitioner,
CLIFF ALLENBY, Director of the California Department of Developmental Services,
Respondent.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

STATEMENT

Petitioner Elsie Y. Golin filed the instant petition for writ of habeas corpus under 28 U.S.C. 2254 on behalf of her 32-year-old daughter, Nancy Golin, who is developmentally disabled. On October 22, 2003, respondent was appointed Nancy's permanent limited conservator following a three-week trial in the probate court of Santa Clara County. This habeas petition, however, focuses on events that occurred *prior* to the recent state-court ruling, when the issue was who would be Nancy's *temporary* conservator. Petitioner first argues that Nancy received ineffective assistance of counsel when respondent was appointed Nancy's temporary conservator. Next, petitioner contends that respondent violated due process by interfering with her parental right to make decisions on Nancy's behalf. This order finds that neither claim has been presented to the highest California court for review. As such, the federal habeas petition is **DISMISSED** for failure to exhaust state remedies.

The facts giving rise to this case date back to November 2001, when Nancy Golin was removed from her parents' home after she wandered away from her father's workshop. Officers of the Palo Alto Police Department located Nancy and observed that she had an apparent burn wound on the top of her foot. Concerned that

Nancy had been neglected and abandoned by her parents, she was placed in Embee Manor, a residential care facility, by the San Andreas Regional Center. On April 23, 2002, respondent filed a petition to be appointed Nancy's temporary conservator. The public defender was appointed to represent Nancy. Petitioner and Jeffrey R. Golin (petitioner's husband and Nancy's father) filed a competing conservatorship petition as did Georgianna Lamb, a friend of petitioner. Ms. Lamb was appointed temporary conservator on October 16, 2002, but then removed February 4, 2003, in favor of respondent.

Meanwhile, on October 3, 2002, petitioner and her husband filed a petition for writ of habeas corpus in the superior court of Santa Clara County. The petition alleged that respondent had illegally confined Nancy and deprived her of proper care and medical treatment. The state court denied the petition without prejudice on January 10, 2003. Similar allegations formed the basis of a second state habeas petition filed February 26. The superior court denied this latter petition on May 15.

On May 27, 2003, respondent was appointed temporary limited conservator. The trial to determine who would be appointed Nancy's permanent conservator was scheduled to begin September 29. Petitioner did not challenge respondent's appointment as temporary conservator on appeal or through collateral proceedings in state court. Instead, she filed the instant federal habeas petition on June 20, stating therein that "[a]ll grounds for relief raised in the Petition for Writ of Habeas Corpus have previously been presented to the Superior Court of the State of California, Santa Clara County."

This matter came to a head on August 14, when petitioner applied ex parte for an order shortening time on a motion for leave to conduct a medical exam and compel the production of Nancy's medical records under Habeas Corpus Local Rule 2254-5. On September 2, the Court held a telephone conference to address the discovery

dispute. Counsel appeared for both petitioner and respondent. Mr. Golin was also present. At that time, respondent raised the argument that this Court did not have jurisdiction in light of the pending state conservatorship proceeding, among other reasons. Petitioner's motion to shorten time was granted, and the matter was set for hearing September 11. Respondent was given until September 8 to file a response to petitioner's discovery request. The parties were instructed that any challenge to this Court's jurisdiction would be an issue for argument at the hearing.

The focus on September 11 was the issue of jurisdiction. There were a number of red flags. *First,* the state court had previously issued an order allowing petitioner to conduct the same medical exam and obtain the same medical records she sought from this Court. Petitioner, in essence, wanted this Court to modify a discovery order of the state court. Moreover, there was an issue as to whether Nancy was "in custody" as required by the federal habeas statute and whether federal habeas proceedings could be invoked to review a state-court determination of parental rights, if such a determination had been made. Finally, from the face of the federal habeas petition it appeared that state remedies had not been exhausted. With the trial to determine who would be Nancy's permanent conservator less than three weeks away, petitioner's discovery motion was taken under submission. The parties were directed to return October 16, to advise the Court of the status of the state-court proceeding.

On September 19, Mr. Golin moved pro se to intervene in this habeas case as a matter of right under FRCP 24(a). Although he alleged identical interests and sought identical relief as petitioner, he argued that his interests were no longer adequately protected. At that time, Mr. Golin attempted (albeit improperly) to have his motion to intervene heard on shortened time on Thursday, September 25. His request was

denied. Nevertheless, on September 23, Mr. Golin filed a voluminous motion requesting leave, *after* intervention was granted, to file a brief and have a hearing on shortened time as to why federal habeas corpus relief was warranted. This latter motion was denied as premature. The parties were told that the issue of intervention was to be heard, if at all, at the status conference of October 16.

On October 16, respondent, but neither petitioner nor Mr. Golin, appeared as ordered. Respondent informed the Court that the trial for the appointment of a permanent conservator had concluded after three weeks and that the probate court had not yet rendered a ruling. By that time, this Court had tentatively concluded that it lacked subject matter jurisdiction over this federal habeas petition since it appeared that petitioner had failed to exhaust her state remedies. Finding support for its conclusion in *In the Matter of Heldris*, 1996 WL 382916 (N.D. Cal. 1996) (Lynch, J.), the Court issued an order to show cause why the case should not be dismissed for failure to exhaust state remedies. All parties (including movant for intervention Mr. Golin) were given the opportunity to brief the issue.

ANALYSIS

In California, the state supreme court, intermediate courts of appeal, and superior courts all have original habeas corpus jurisdiction. *See Nino v. Galaza,* 183 F.3d 1003, 1006 n.2 (9th Cir. 1999). Before a federal court, however, may review a petition for writ of habeas corpus, state remedies must first be exhausted, either on direct appeal or through collateral proceedings, by presenting the *highest state court available* with a fair opportunity to rule on the merits of each and every claim raised in federal court. *See* 28 U.S.C. 2254(b), (c); *see In the Matter of Heldris,* 1996 WL 382916 at *2–3 (dismissing federal habeas petition for failure to exhaust state remedies where superior court imposed permanent conservatorship and petitioner did not seek review of ruling from either the state court of appeal or supreme court). This total exhaustion requirement protects principles of comity between federal and state courts. *See Rose v. Lundy,*

455 U.S. 509, 515–19 (1982). As such, if available state remedies have not been exhausted as to all claims, the district court must dismiss the petition. *Id.* at 522.

The record here shows that petitioner has not given the highest California court a fair opportunity to rule on the merits of the claims she now raises in this Court. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (holding that federal petitioner must invoke "one complete round of the [s]tate's established appellate review process" because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts). Petitioner filed two petitions in the superior court, both of which were rejected without prejudice. Rather than pursue her remedies through the California appellate system, petitioner prematurely filed the instant petition. She does not dispute as much in her federal habeas petition, stating that "[a]ll grounds for relief stated in the Petition for a Writ of Habeas Corpus have previously been presented to the Superior Court of the State of California, Santa Clara County" (Pet. ¶ 29) (italics added). The mere presentation of her constitutional claims to the superior court does not bestow authority upon this Court to review her federal claims.

Petitioner argues, nonetheless, that this Court can still "proceed on the merits of the [federal] petition." In response to this Court's order to show cause, petitioner claims to have filed a habeas petition in the California Supreme Court. This, however, is not enough. As mentioned, neither of petitioner's claims have been exhausted. The state supreme court must review the petition and issue its decision before petitioner can seek relief in federal court.

And contrary to Mr. Golin's assertions, this case does not present circumstances that would justify an exemption from the exhaustion requirement. It is true that exhaustion of state remedies may be excused where, for example, the state review process is incapable of rendering effective relief. Such

circumstances do not exist here. There is nothing on this record (beyond Mr. Golin's conspiracy theories) to warrant federal intervention before the state review process has had the full and fair opportunity to consider the constitutional issues raised herein.

CONCLUSION

For the reasons stated, the petition for writ of habeas corpus is **DISMISSED WITHOUT PREJUDICE.** Once she has exhausted her state remedies, petitioner may file a new federal habeas petition. The motion for intervention of Mr. Golin is DENIED AS MOOT. The Clerk shall **CLOSE THE FILE.**

IT IS SO ORDERED.

Dated: November 24, 2003.

/S/ WILLIAM ALSUP
WILLIAM ÁLSUP

(ENDORSED)
FILED
MAY 15, 2003
KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA Santa Clara County
By_____Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

In re Conservatorship of Nancy Golin
Case No. 1-02-PR-151096

WRIT

Mr. and Mrs. Golin filed a Writ of Habeas Corpus to obtain the release of their daughter from the residential placement home where she is residing. They are seeking her release so that she can reside with them. This matter was not timely brought to the Court's attention because the Judge assigned to this case was challenged by the Golins. The matter was sent to a Judge out of county and the Writ languished. This Court will hear this matter and all matters in the future. A trial on the conservatorship issues and other matters is scheduled for June 2, 2003.

Presently, the Golins are only permitted supervised visitation with their daughter, If the Writ was granted, their daughter, Nancy Golin, would have no residence since she could not return to her parents because of the supervised visitation condition. Therefore, this Writ must presently be denied. After the supervised visitation issue is decided, the Writ can be revisited.

Dated: May 15, 2003
s/CATHERINE GALLAGHER
CATHERINE A. GALLAGHER
Judge of the Superior Court

WJE\st\F-Gallagher

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Amendment I:

> ***Congress shall make no law*** respecting an establishment of religion, or prohibiting the free exercise thereof; or ***abridging the freedom of speech***, or of the press; ***or the right of the people peaceably to assemble***, and to petition the government for a redress of grievances.

U.S. Constitutional Amendment IV:

> ***The right of the people to be secure in their persons***, houses, papers, and effects, ***against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation***, and ***particularly describing*** the place to be searched, ***and the persons*** or things ***to be seized***.

U.S. Constitutional Amendment V:

> ***No person shall*** be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor ***be deprived of life, liberty, or property, without due process of law***; nor shall private property be taken for public use, without just compensation.

U.S. Constitutional Amendment VI:

> ***In all criminal prosecutions, the accused shall enjoy the right to*** a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to **be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.**

U.S. Constitutional Amendment VII:

> ***In suits at common law, where the value in controversy shall exceed twenty dollars, the right of***

trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

U.S. Constitutional Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, ***nor cruel and unusual punishments inflicted.***

U.S. Constitutional Amendment XIV:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. ***No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....***

Section 5: The congress shall have the power to enforce by appropriate legislation, the provisions of this article.

42 U.S.C. §12132:

Subject to the provisions of this title, ***no qualified individual with a disability shall, by reason of such disability,*** be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, ***or be subjected to discrimination by any such entity.***

28 U.S.C. 2253(c)

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court...

A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §2254...

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court,

that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.